

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

:

Docket #03cv9685

MCRAY, RICHARDSON, SANTANA,  
WISE AND SALAAM LITIGATION

:

: New York, New York  
July 12, 2011

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PROCEEDINGS BEFORE  
MAGISTRATE JUDGE RONALD L. ELLIS,  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs  
McRay, Richardson,  
Santana, and Salaam:

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: In the matter of McRay, Richardson,  
3 Santana, Wise & Salaam Litigation versus the City of New York.  
4 Will all counsel, please identify yourselves for the record.

5 MR. MYRON BELDOCK: Myron Beldock for the Salaam  
6 plaintiffs along with Karen Dippold from Beldock, Levine &  
7 Hoffman.

8 MS. JANE FISHER BYRIALSEN: Good morning, Your  
9 Honor, Jane Fisher Byrialsen on behalf of the Wise plaintiffs.

10 MR. ROGER WAREHAM: Also on behalf of McCray,  
11 Santana and Richardson plaintiffs and also Michael Warren and  
12 --

13 MS. EVELYN WARREN: And Evelyn Warren for the for  
14 the McCray, Santana and Richardson plaintiffs.

15 HONORABLE JUDGE RONALD L. ELLIS (THE COURT): Good  
16 morning.

17 MS. WARREN: Good morning.

18 MS. ELIZABETH DAITZ: Good morning, Your Honor,  
19 Elizabeth Daitz for defendants.

20 MR. PHILIP DePAUL: Good morning, Your Honor,  
21 Philip DePaul for defendants.

22 MS. GENEVIEVE NELSON: Genevieve Nelson for  
23 defendants. Good morning.

24 MR. ANDREW MYERBERG: Andrew Myerberg for the  
25 defendants. Good morning, Your Honor.

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2 MS. ELIZABETH DULHAM: Good morning, Your Honor,  
3 Elizabeth Dulham for defendants.

4 MR. RICHARD BAILEY: Good morning, Your Honor,  
5 Richard Bailey (indiscernible).

6 MR. BELDOCK: May I start, Your Honor?

7 THE COURT: You may.

8 MR. BELDOCK: Because it's probably appropriate  
9 that I start. We have been discussing, as both sides I think  
10 have advised your law clerk, the privilege log issues which I  
11 may say is the logjam in the case right now. And we have  
12 agreed upon several things.

13 A briefing schedule whereby we would serve and file  
14 our brief concerning the issues next Tuesday, that's the 19th.  
15 The defendants would serve their reply by the 29th, and if  
16 need be, their answering papers by the 29th. We will reply by  
17 August 5th. So the scheduled is the 19th, the 29th and the  
18 5th.

19 But in regard to that, we have a sub-schedule, so to  
20 speak. We have, that is the defendants have created, and it's  
21 almost completed a log, an alternate log which is based upon  
22 the privilege log but is broken down into categories. For an  
23 example, ABA notes and many subheadings. The Armstrong-  
24 related papers and many sub -- and some sub-headings which we  
25 think will be helpful both for the parties to attack the

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2 issues and the court, of course, to consider the issues.

3                   There are over 8,000, I think over 8500 documents  
4 marked "Privileged." There were more, initially, and they cut  
5 them down somewhat by almost a thousand based upon some  
6 exchanges that we've had. And now we're up to the point where  
7 we're going to present our legal position to Your Honor.

8 We'll present the original log, the categorized log, and you  
9 will make the rulings.

10                  So I'm going to get this log to them before the  
11 19th, hopefully by this Friday and if the court wants it in  
12 advance, you can have it, but I think it's probably better  
13 that you get it along with our submission next Tuesday.

14                  THE COURT:    We can probably wait.

15                  MR. BELDOCK:   So that's my report. We've spent  
16 considerable time doing this and I think we're -- we want to  
17 be able to keep to that schedule, barring any emergencies.

18                  THE COURT:    Okay. Well, I always appreciate when  
19 things are narrowed, and if for not other reason then it does  
20 seem to that there is dialog going on between the plaintiffs  
21 and the defendants, so that you could give me a more limited  
22 group of documents to look at.

23                  MR. BELDOCK:   Yes, well that's my objective is --  
24 incidentally, I didn't go on to say we're going to then have  
25 another subset of documents grouping them by witnesses we are

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2 -- are seeking to depose and witnesses that have been held off  
3 because of these problems. And we're going like select all  
4 the documents that relate, from the privilege log, that relate  
5 to Linda Fairstein, Assistant District Attorney.

6 So there's some prioritizing we're going to try to  
7 do, and also we're going to suggest a method to do just what  
8 Your Honor suggested -- to select from the bulk of documents  
9 in the different categories what we hope are exemplary  
10 documents so that you can make a general ruling.

11 THE COURT: Okay. And --

12 MR. BELDOCK: And it's not easy. It may not be  
13 possible, but we're doing the best we can to get to that  
14 point.

15 THE COURT: And how are things going generally, I  
16 mean in terms of scheduling depositions? I gather you've at  
17 least talked about which ones need to be held up because of  
18 documents and how are we doing it if you could --

19 MR. BELDOCK: Your Honor, we have not moved as  
20 swiftly as we intended or had hoped. We've set an ambitious  
21 schedule for depositions. We've scheduled them; we've tried  
22 to reschedule them. There've been things that happen. We're  
23 really held up on this particular issue as to a major grouping  
24 of witnesses. Others are scheduled to go forward. There'll  
25 be several next week, I think, or the week after and there

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2 have been several that have been held.

3                   But we need to resolve this problem in the hope that  
4 it can be resolved in August so that we can take the bulk of  
5 the remaining depositions in August and September. I -- I --  
6 you know, representing both sides here, speaking, I think  
7 we've tried and we have these problems that have to be  
8 resolved.

9                   THE COURT: Okay. Well let me just indicate one  
10 thing from my point of view. And while my law clerks might  
11 disagree with this in different years, I think it'd be cruel  
12 and unusual to have a new law clerk come in and deal with  
13 this.

14                   So it's certainly my hope that we do resolve this  
15 before this young man gets grey or leaves, whichever comes  
16 first.

17                   MS. WARREN: When is that?

18                   THE CLERK: September 9th.

19                   MS. WARREN: Oh, boy.

20                   MR. BELDOCK: We'll fix everything by then. Don't  
21 worry about that.

22                   THE COURT: Okay. So -- because obviously it's  
23 hard to get up to speed and have a sense of this. And I can't  
24 have conversation with someone I know, and he shows them the  
25 locker the documents are in and they say, can I quit now.

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2 MR. BELDOCK: Well, I understand the City -- pardon  
3 me. I may be wrong about this; they'll have to speak to it.  
4 But I believe that in setting this briefing schedule on the  
5 29th, when the City is going to answer, they're also going to  
6 supply documents unredacted to begin the in-camera review.

7 And we will have set up the program, the proposal,  
8 before that, so it's not going to be -- it's enough to wait  
9 for us, our answer, our reply in August, if we have any reply.

10 THE COURT: Ms. Daitz?

11 MS. DAITZ: Your Honor, I don't think we disagree  
12 with the bulk of what Mr. Beldock said. I think our only  
13 issue is we'd like to see the categories that the plaintiffs  
14 are working on, the breakdown of the documents as they've  
15 organized them, before we can take for certain that we would  
16 be prepared to submit something in-camera from each and every  
17 category on the date of our opposition.

18 But Mr. Beldock assured us that he would have that  
19 to us to the extent possible even before they file their  
20 moving papers, and we'll obviously confer with the plaintiffs  
21 again at that point regarding those issues.

22 And the other thing that I think defendants don't  
23 necessarily agree with is the idea of categorizing documents  
24 by witness whose deposition plaintiffs necessarily intend to  
25 take I think that it would potentially lead to either -- I'm

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2 not sure if they're seeking a piecemeal ruling on a per-  
3 witness basis, but I don't think that the overall issues  
4 really could lend themselves being broken down by witness as  
5 opposed by the category of documents irrespective of who they  
6 are about.

7                   But I think we're open to further discussion again  
8 with plaintiffs about that issue, both before and after they  
9 file their moving papers. And if it turns out that we don't  
10 agree with that approach, we'll make it known in our  
11 opposition on the date that we're scheduled to file it.

12                   THE COURT: The only thing I would remind all  
13 counsel about is that it's not a perfect world. And I know  
14 that everybody has their litigation strategy about how they  
15 want to do something. But ultimately, we'll do the best with  
16 what we can and in whatever divisions that we can work with,  
17 whether it's the, you know, trying to divide documents by  
18 deposition or by person or whatever.

19                   If you have -- if there were a hundred documents  
20 that you thought you wanted for a witness and you had 90 of  
21 them, I'd say, well you do that deposition and not hold up for  
22 the other 10. But that's sort of a general comment. I mean  
23 obviously there can be exceptions to that. Sometimes the one  
24 document is more important than all the other 99. Okay.

25                   MR. WARREN: Your Honor, just on this issue before

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2 you move to the other, because I think this was the only  
3 reason I was invited here by both parties as a representative  
4 of Danny (phonetic) I just -- once I see what plaintiffs'  
5 papers are and they may wish to put them along the same  
6 briefing schedule papers as well.

7                   THE COURT: I'll have to explain to my interns  
8 later what Danny is. All right. Anything else on that? It  
9 sounds like you're getting along on that.

10 MS. DIPPOLD: Well, I believe there is a letter to  
11 the court about expert disclosure and modification of the  
12 original confidentiality stipulation that was filed back in  
13 October of 2008.

14 THE COURT: Yes.

15 MS. DIPPOLD: And we are in basic agreement with  
16 the idea that experts should be able to have these documents  
17 in their offices. And indeed, when the original stipulation  
18 was negotiated, we negotiated with Jennifer Rawson from the  
19 corporation counsel's office who is now no longer there.

20 And the idea we had was that experts were likely to  
21 be not in New York City -- to be in other parts of the  
22 country, and that it would be very difficult for them to come  
23 to the corporation counsel office or our offices to look at  
24 the confidential documents.

25 The one problem I'm having with the corporation

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2 counsel's proposal to modify the stipulation has to do with an  
3 order that Judge Batts entered on May the 5th of 2010. There  
4 was an application by Ms. Rawson to disclose the confidential  
5 documents to a number of other city agencies: The police  
6 department, the controller's office, the mayor's office.

7                   We opposed that and it was done in writing and Judge  
8 Batts entered an order that provides in its final paragraph  
9 that the New York City Law Department may not disclose  
10 confidential information to other city agencies or their  
11 staff.

12                   So I am contemplating a situation, as I often  
13 encountered in civil rights actions, in which the city uses an  
14 expert from the police academy or some other city agency in  
15 their case. And it's our position that with respect to those  
16 experts, if they are employed by a city agency, the  
17 confidential documents that they use should be left in the  
18 offices of corporation counsel, and they should use them in  
19 the office of corporation counsel so that there's not the  
20 concern that we had before, that some of these documents will  
21 be shown to individuals who might disclose them. That was our  
22 concern about this.

23                   Otherwise, we're in agreement that an expert who's  
24 not employed by the city should be able to use these documents  
25 in their offices as long as they abide by the terms of the

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2 stipulation.

3 THE COURT: So that's a narrowing and if you  
4 disagree on that, then I just have to decide that issue.

5 MS. DAITZ: Yes, Your Honor, and we do disagree on  
6 that, in part because the language that we've requested in our  
7 letter application of yesterday specifically says that the  
8 documents, the confidential information, must otherwise be  
9 maintained and protected in strict compliance with the  
10 requirements of the applicable stipulation.

11 And we see no basis for plaintiffs' assumption that  
12 an employee of the city would be any less trustworthy and  
13 capable of abiding by the terms of the stipulation than an  
14 outside expert to the extent that we do have the opportunity  
15 or the necessity to use a city employee as a consulting or  
16 expert witness in this case.

17 I think that those folks, when they've read the  
18 stipulation, and signed Exhibit A -- as all on party and  
19 expert witnesses and parties must do -- will be plainly  
20 capable of abiding by the terms of the stipulation, even if  
21 the documents are in their office to facilitate --

22 THE COURT: Okay. But you agree that at least on  
23 its face that would be covered by Judge Batts's order.

24 MS. DAITZ: Well, I think Judge Batts's order, I  
25 mean, there was a lot of discussion about (indiscernible) at

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2 the time and there were written submissions, and it didn't at  
3 all accommodate expert or consulting or testifying expert  
4 witnesses. What the order contemplated, and to give the court  
5 a little bit of background, the order was entered in  
6 connection with the negotiation of the second stipulation of  
7 protective order for plaintiffs' confidential information.

8                   Judge Batts's ruling, however, was broad, to impart  
9 the language to all of the stipulations that had been executed  
10 to date and going forward. And I think that the issue there,  
11 as defendants presented it, was in order to ever contemplate  
12 settlement of the case, certain litigation decisions, that we  
13 had a necessity to confer with the client and the client  
14 agencies as a whole in order to facilitate the litigation.

15                   Judge Batts definitely rejected that viewpoint, but  
16 that was done without any mention or consideration of  
17 individuals acting as expert witnesses. It was on an agency-  
18 wide basis, unlimited to particular individuals who may need  
19 to access the information. So I think it just wasn't  
20 contemplated at that time by Judge Batts's order.

21                   THE COURT: That may be so. On the other hand was  
22 whether or not technically he'll be covered by the order as  
23 it's -- it may not have considered it, but it also doesn't  
24 distinguish any particular person in the agency either.

25                   MS. DAITZ: It doesn't, Your Honor.

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2                   THE COURT:    Okay.  So, maybe if asked to modify it,  
3 she would just say, well okay, experts are different, but that  
4 wasn't presented to her.

5                   MS. DAITZ:    It wasn't, Your Honor.

6                   THE COURT:    Okay.  And what kinds of in-house  
7 experts would we be talking about?

8                   MS. DAITZ:    Well, it's something that plaintiffs  
9 raised, Your Honor.  We haven't gotten to expert discovery yet  
10 and, you know, in an interest of moving litigation along in  
11 part why we await a ruling on the work product privilege, this  
12 is one issue that we wanted to, you know, tie up as soon as  
13 possible so the parties could move forward, knowing what the  
14 exact parameters of the stipulation were.

15                  And it was plaintiffs that raised the possibility of  
16 the city using N.Y.P.D. or other city agencies as expert  
17 witnesses.

18                  THE COURT:    Okay.  So what you're telling me is you  
19 don't know whether there'll be any of those in-house experts.

20                  MS. DAITZ:    It's a possibility, Your Honor.  I  
21 mean, I don't know that we could say at this point.

22                  THE COURT:    Okay.  Well, this is not something that  
23 would come up, like, on a five hour's notice, would it?  If  
24 you're going to use any in-house experts the plaintiffs would  
25 know about it, I would know about it, and we --

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2 MS. DAITZ: Well, Your Honor -- I'm sorry.

3 THE COURT: Since, if I understand you correctly,  
4 there is no presently identified in-house expert that's a  
5 problem at this point.

6 MS. DAITZ: Well, Your Honor, this would apply to  
7 consulting experts as well as testifying experts, and I don't  
8 believe that parties are obligated under the federal rules to  
9 disclose their use or the identity of consulting experts,  
10 unless and until they become testifying experts.

11 So I don't know that this is a circumstance where we  
12 would necessarily be obligated to disclose to plaintiffs or  
13 certainly the court, you know, upon an order -- but in the  
14 regular course -- who are consulting experts who are aware  
15 they were employed.

16 THE COURT: Okay. And so --

17 MS. DIPPOLD: Your Honor, if I might clarify, this  
18 particular order does in fact relate to the stipulation and  
19 order that was entered on October 28th, 2008. And the written  
20 exchange did not occur in the context of talking about the  
21 separate stipulation confidentiality order that was entered  
22 with respect to the plaintiffs' documents.

23 And just to make certain that our position is clear,  
24 what we have seen in other cases is that the police department  
25 will often use, for example, someone from the police academy

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2 to talk about training issues or about how interrogations are  
3 conducted or this sort of material. Or they might use someone  
4 from the medical examiner's office. And there has been a lot  
5 of hostility expressed in this case so we are concerned about  
6 documents.

7                   Thus far, the confidentiality stipulations have  
8 worked very well. None of the documents have seemed to have  
9 gone out into the press and nothing that's harmful to either  
10 side has been published, and we want to keep it that way, so  
11 that's our concern.

12                  THE COURT: Well, actually my thought processes on  
13 this are a little different in the sense that on a typical  
14 situation where the parties have experts there is no  
15 restriction on what the experts get to see. There's no --  
16 there's not this big concern about confidentiality.

17                  And when there is confidentiality, what you're  
18 really concerned about is that you can track who gets to see  
19 what so that if there are any problems, you know who it is.

20                  It seems to me that regardless of what the nature of  
21 any expert is, at some point we've got to keep track of who  
22 gets to see the documents. I have the City's letter. I don't  
23 know whether the plaintiffs want to put in a letter about  
24 their concerns, other than what they've stated here.

25                  I would like to think about it just a wee bit what

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2 the particular ramifications are and limitations, particularly  
3 in the defendants' use of experts.

4 MS. DIPPOLD: If I could just clarify, we're not  
5 looking to prevent the City from having these sorts of  
6 experts. We just would prefer that these experts look at  
7 confidential documents in the offices of corporation counsel.  
8 That's really all we're asking.

9 MS. DAITZ: Your Honor, I just want to emphasize,  
10 you know, to supplement defendants' application that we are  
11 talking about individuals, not about sharing the document with  
12 the agency.

13 And that under the stipulation and protective order,  
14 indeed under both stipulation and protective orders, any  
15 individual who has access to the information must execute the  
16 accompanying Exhibit A attesting to the fact that they have  
17 read and understood the terms of the stipulation and that they  
18 agree to review, maintain, and keep the documents, and keep  
19 the information they've gained in the strictest of confidence  
20 in accordance with the stipulation.

21 So the stipulation has a built-in way of keeping  
22 track of exactly who has access to the information.

23 THE COURT: The reason, as I understand it, that  
24 you want to -- you want to be able to not be hampered by the  
25 earlier stipulation is because it's very inefficient to use

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2 experts and I think you both mentioned it -- experts are not  
3 necessarily local. And getting them here, not only time but  
4 there's expense involved in doing it. I'm not so sure those  
5 considerations necessarily comply if you're talking about in-  
6 house experts.

7 MS. DAITZ: Your Honor, part of the issue is that -  
8 - well, first of all, I think to the extent any party were to  
9 retain a consulting or testifying expert within New York City,  
10 there would be less of a concern about the in-office, you  
11 know, the expense of the in-office review provision. And that  
12 goes for city employees as well as potentially some  
13 plaintiffs' experts who reside and work, you know, within  
14 blocks of their offices potentially.

15 The other issue with respect to time and expense,  
16 Your Honor, is that even with respect to city employees to  
17 allow them to have the ability to review these documents and,  
18 you know, do the work that they're expected to do as an  
19 expert, for them to be able to do it in their own time, at  
20 their own place, within their own office is definitely an  
21 issue, even for city employees.

22 I mean, there's definitely difficult to, you know,  
23 in the broadest terms, expect someone to come to our office to  
24 do the work that they're retained to do as an expert,  
25 particularly where their own, you know, files and computers

1 and the types of things experts would use in preparation of an  
2 expert report, or a preparation of a -- the work as a  
3 consultant that is inefficient to do it in the parties'  
4 offices. And I think that same concern extends to any experts  
5 who's within the confines of New York City.

7 THE COURT: And what kind of confidential -- you're  
8 concerned that the documents get out into -- I mean, what  
9 kinds of documents are we talking about?

10 MS. DIPPOLD: Well, the confidential documents run  
11 the gamut, from our client's very personal medical records to  
12 rap sheets, to the confessions, to videotapes, to all sorts of  
13 investigations conducted by the officers who worked on the  
14 Armstrong Commission who investigated the original case.

15 There are -- the assortment of documents is really  
16 vast and some of it is very personal. There are things like,  
17 did someone ever received welfare, did they ever receive  
18 public assistance, did they ever lose a job. I mean, there  
19 are employment records in there. There are all kinds of  
20 things.

21 And how much of the burden would it be for someone  
22 who's employed by the police department to walk from one  
23 police plaza to the corporation counsel's office to look at  
24 these documents if they need to do that?

25 And one would think that the police department will

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2 have an awful lot of these documents in their offices anyway.  
3 So it just -- if we -- if we're talking about an independent  
4 expert who's here in New York City, fine. They can take the,  
5 you know, they can have the documents in their office. But  
6 when you start defining, let's say they have someone from one  
7 police plaza.

8                   The stipulation refers to an expert and their staff  
9 having access to these documents. How are we going to define  
10 staff in that kind of circumstance? How far will the person  
11 at the police department allow these documents to go? That  
12 was the original battle that resulted in this order from Judge  
13 Batts.

14                  MS. DAITZ: Your Honor, I just have to address a  
15 few things that Ms. Dippold raised. The first issue being  
16 that I contest to the fact that the city has been incredibly  
17 careful with what documents are turned over to our client  
18 agencies in light of Judge Batts's ruling.

19                  So to say that the police department has these  
20 documents in their offices already is absolutely to the extent  
21 it concerns plaintiffs' information and information that was  
22 produced to us from sources other than the N.Y.P.D. is  
23 completely inaccurate.

24                  I think the second point is that to the -- there's  
25 not -- the personal information, the confidential information,

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2 in this case is not solely about the plaintiffs. Defendants  
3 have also produced the individual officer's personnel files,  
4 training materials, things that are normally potentially  
5 covered by the law enforcement privilege, the official  
6 information privilege. I mean, things that the City equally  
7 expects the confidentiality to be maintained by the  
8 plaintiffs.

9                   And I think we have an inherent faith in plaintiffs'  
10 ability to abide by the stipulation and protective order and  
11 to have their consulting and expert witnesses read it and  
12 execute it and abide by it.

13                   And I just see no difference with respect to  
14 employees of city agencies that should be treated any  
15 differently in that type of exemption.

16                   THE COURT: Well, one thing that Ms. Dippold  
17 mentioned is this, and this, I mean, if you hire experts and  
18 associated, they're used to being experts. Their staff is  
19 pretty well defined, we know who they are, they're probably  
20 used to dealing with information and they're trained on  
21 confidential documents.

22                   If you talk about staff and you're dealing with a  
23 city agency, I'm not sure the same kinds of experience in  
24 terms of handling confidential information exists and the  
25 point she made is that, well, who is this staff that's covered

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2 by the stipulation if we deal with a city agency?

3 MS. DAITZ: Your Honor, if I may --

4 THE COURT: I mean, if you get somebody in the  
5 police department, for example, what if your expert is going  
6 to be Captain So-and-So? Who gets to see it?

7 MS. DAITZ: Well, Your Honor, if you're dealing  
8 with an individual at a city agency who is of sufficient  
9 knowledge and expertise about a particular topic at issue in  
10 this litigation, then more likely than not, that person does  
11 not have a staff around them.

12 If someone were to, you know, even make photocopies  
13 in this case, everyone is signing the exhibit. Everyone is  
14 getting a copy of the stipulation. I mean, there's no  
15 question that we're extremely careful in talking to our  
16 parties, non-party fact witnesses, everyone who we've come  
17 into contact with during the course of this litigation about  
18 the confidentiality.

19 And I do think that there is an expectation with  
20 people that are higher than your average patrolman or, you  
21 know, correction officer or, you know, person walking the  
22 beat, that they certainly do have an understanding and  
23 appreciation for the nature of confidential information,  
24 particularly with respect to this case.

25 And even at the law department our staff signed

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2 Exhibit A to the stipulation when they have any access to any  
3 information in this case as all. So I think -- and the fact  
4 that there has been no breach when city agencies, such as the  
5 law department and our staff, have had access to this  
6 information, it's indicative of the fact that we don't have  
7 any reason to believe there would be a breach if our  
8 consultant or testifying expert were to have access to the  
9 information in their offices.

10                   And I think the same could be true regardless of  
11 whether you're talking about the in-office review provision or  
12 the out-of-office review provision. I mean, I think anyone  
13 you retain as an expert, you have to have somewhat of inherent  
14 faith in their ability to abide by a confidentiality order in  
15 a case as high-profile as this one. And I don't think  
16 anything about their employment with the City of New York  
17 makes them less capable to do so.

18                   THE COURT: Well, I agree with you in one sense. I  
19 think just having these discussions and assuming that you'll  
20 convey these discussions to your experts, has a positive  
21 impact on the question of whether or not they will be  
22 trustworthy.

23                   My -- with respect to the specific question, I take  
24 it that you're saying that we're not necessarily dealing with  
25 somebody who has a staff as an outside expert might have.

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MS. DAITZ: I don't anticipate that at all, Your

Honor.

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THE COURT: And my other area of inquiry is this,

and since I'm sure you two are -- both sides are very converse in this -- assuming that there was a breach, what kinds of retribution could I or Judge Batts say?

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MS. DAITZ: Your Honor, I don't think the stipulation is specific with respect to the consequences of the breach. But I believe early on in Your Honor's role in the litigation you made it quite clear to all parties that the consequences before this court would be severe, both for the attorneys, if the attorneys were responsible for a breach, or if there was a witness who a breach could be traced back to.

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And I believe -- and I -- safe to say on behalf of

all parties, that we took that admonishment very seriously and that we take the confidentiality order very seriously.

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THE COURT: You do understand, of course, that that

probably means from my point of view is that were I to trace

the breach to a particular side, then it's the attorney's

responsibility. You're ultimately responsible for anybody who

gets to see the information, that is, whatever conversations

you have with them, whatever you can convey to them about the

serious nature of any particular breach, I assume that you

have those conversations with the people that you allow to

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2 have access to this information.

3                   I agree with the general proposition that experts  
4 work better when they have access to information. I think  
5 anyone who has been in the legal profession understands that  
6 it's a lot easier to deal with documents and other information  
7 if you have it on hand.

8                   And so I think on balance, I think that I would like  
9 to review the -- what the experts will have to sign. But it  
10 does not appear that even in-house experts pose a significant  
11 enough problem to begin with, such that they -- we should have  
12 a rule prohibiting them from seeing the information.

13                   I've heard the plaintiff concern, although I think  
14 ultimately the question that's balancing the efficiency of the  
15 litigation versus the potential that some expert, however  
16 they're designated or determined, will breach the  
17 confidentiality agreement, leads me to the conclusion that  
18 experts should have access outside of the area in which the  
19 documents reside.

20                   Again, I would like to read exactly what it is that  
21 they sign and determine whether or not it requires any  
22 particular supplementation. But --

23                   MS. DAITZ: Your Honor, we can have clean copies of  
24 both stipulations handed to the court this afternoon.

25                   THE COURT: So we don't have to find them in our

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2 file?

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3 MS. DAITZ: Sure.

4 THE COURT: We have these things indexed -- okay.

5 MS. BYRIALSEN: Judge, I have an application that's  
6 much simpler but related to this issue that the parties have  
7 consented, that I'm going on maternity leave starting July  
8 27th and have sought the consent of my co-counsels to get an  
9 exception to the in-office review only, and take the  
10 confidential documents with me, either on CDs or on a USB port  
11 while I'm away so I'm seeing the court's permission for that.

12 THE COURT: And you adversaries have agreed to  
13 this?

14 MS. BYRIALSEN: Yes, very nicely.

15 MS. DAITZ: Your Honor, we have consented with  
16 certain conditions that Ms. Byrialsen has agreed to that we  
17 would like to just put on the record as well.

18 THE COURT: Go ahead.

19 MS. DAITZ: And that would be that either disks or  
20 USB ports be carried on in carry-on luggage to reduce the risk  
21 that they would be lost. Not that I would wish that on Ms.  
22 Byrialsen or anyone else.

23 That the confidential information will be in a  
24 secure location where no one else can access them but they  
25 will be in a locked safe in Ms. Byrialsen home office.

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2                   That the documents won't be accessed at times where  
3 they could be visible to or accessible by anyone else and that  
4 Ms. Byrialsen will be accessing the information only for the  
5 purposes of her own review and not preparing witnesses or  
6 clients by telephone, Skype or any other electronic means from  
7 abroad.

8                   THE COURT:   And that the disk be only accessible by  
9 256 byte inscription where she has a biometric code to access  
10 the documents?

11                  MS. DAITZ:   Your Honor, if I knew what that was,  
12 I'm sure I would request it. But I think it does go to show  
13 how seriously the parties take their confidential information.

14                  THE COURT:   Okay. Well, again, I have no doubt  
15 that the lawyers understand that if anything gets out and it  
16 gets traced to them, it won't be a very pleasant situation.  
17 But I -- consistent with what I've just said about the  
18 difficulty of dealing with documents when you don't have  
19 access to them I think -- is this a stipulation that you have  
20 that's been signed by the parties?

21                  MS. BYRIALSEN:   Yes, I've signed it but we haven't  
22 created a written stipulation for this issue. We have  
23 discussed it by e-mail and I've made the initial application  
24 to them by letter.

25                  THE COURT:   Okay.

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2 MS. BYRIALSEN: So if I could just see a court  
3 order saying that I have that, you know, an exception from  
4 July 27th to October 4th while I'm away.

5 THE COURT: Okay. So we have to do an order or  
6 you've drafted an order?

7 MS. BYRIALSEN: No, I can send one. I thought we  
8 could do it orally but if you wanted a written one I could  
9 certainly submit one.

10 THE COURT: Okay. Michael, do we have the same  
11 recording capabilities here?

12 THE CLERK: Yes, Your Honor.

13 THE COURT: Okay. So this has all been recorded?

14 THE CLERK: Yes.

15 THE COURT: Okay. Then your application is  
16 granted.

17 MS. BYRIALSEN: Thank you, Your Honor.

18 THE COURT: And I assume the ultimate security,  
19 this gets erased after five seconds. No, in any case -- all  
20 right. We're trying to do this so that the parties are no  
21 unnecessarily hampered. And as I said, you can anticipate  
22 that the application for experts, which I do think technically  
23 if they were in-house people, would be covered by Judge  
24 Batts's order, although I think pretty clearly would not  
25 contemplate it and I'm assuming that we're not going to have

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2 somebody who's designate as an expert.

3 So, and if it turned out that such a thing happened,

4 I wouldn't want to have to explain it to one of the judges.

5 So but again, I do want review what the experts have to sign

6 and then I'll issue an order. Yes, Ms. Dippold?

7 MS. DIPPOLD: We'd also like to provide you with a

8 copy of Judge Batts's order.

9 THE COURT: Okay.

10 MS. DAITZ: Your Honor, to the extent plaintiffs  
11 might need 30(b)(6) witnesses, I'm not sure if they're making  
12 a distinction between 30(b)(6) witnesses and consulting or  
13 testifying experts. I'm just assuming that they would all be  
14 treated the same under the stipulation.

15 THE COURT: But even whether or not the 30(b)(6)  
16 witnesses can see documents?

17 MS. DIPPOLD: I'm not sure what she means by that.

18 MS. DAITZ: Under federal rule 30(b)(6) if  
19 plaintiffs were to request than an individual testify on  
20 behalf of the City on a particular issue in the litigation,  
21 but they would be treated as a consulting, or in that case, a  
22 testifying expert for the purposes of the stipulation.

23 THE COURT: You mean whether or not somebody who's  
24 a 30(b)(6) gets to see the confidential documents?

25 MS. DAITZ: Outside of the office in the same way

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2 that other experts would. I think that's what Ms. Dippold was  
3 referencing when she said often times in civil rights cases  
4 that the city would designate an in-house person to testify  
5 about an issue such as training, or from the medical examiners  
6 office, or something of that nature. That would be a 30(b)(6)  
7 witness, as I understand, as opposed to the corporation  
8 counsel's office says, you know, you get a person as an  
9 expert.

10 THE COURT: Are you anticipating that 30(b)(6)s  
11 would be looking at the confidential information? Is that --

12 MS. DAITZ: I think they would have to, to testify,  
13 Your Honor.

14 THE COURT: I guess that depends on what they're  
15 testifying about.

16 MS. DIPPOLD: I wasn't thinking in terms that the  
17 30(b)(6) witness and I think we have to take into  
18 consideration here that the bulk of documents in this case are  
19 coming from the police department.

20 So if I notice a 30(b)(6) police officer from the  
21 police academy about training issues, one would think that any  
22 documents the corporation counsel has would have come from  
23 them. So I would think they would have access to the very  
24 documents they need to testify in their own premises.

25 MS. DAITZ: Well, the problem with that, Your

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2 Honor, is that Judge Batts's decision is rather unclear on  
3 that with respect to documents that the police department  
4 produced originals to the corporation counsel's office for the  
5 purposes of the litigation. And then an order was entered  
6 preventing the corporation counsel office from resharing that  
7 information that was produced as confidential with the police  
8 department. So we do have somewhat of an odd situation here  
9 with respect the confidential information.

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THE COURT: Well, I understand but if I'm  
11 understanding the description, a 30(b)(6), the confidential  
12 information they'd be looking for is confidential information  
13 produced by the defendant, generally.

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MS. DAITZ: I would think so, Your Honor.

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MS. DIPPOLD: Yes.

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THE COURT: So --

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MS. DAITZ: But again, the order --

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THE COURT: So although technically there would be  
19 a problem in the sense that it would violate the order, the  
20 plaintiffs don't have an objection to it and the defendants  
21 really don't have an objection to it.

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MS. DAITZ: That's right, Your Honor, as far as I  
23 understand Ms. Dippold.

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THE COURT: Okay. And so that's why when you said  
25 30(b)(6) I wasn't sure why they would be looking at the

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2 documents that the plaintiff was concerned about.

3                   But if there are some documents that the defendant  
4 designated as confidential, and the 30(b)(6)s seeking to be  
5 prepared as a witness, and needs to look at those documents,  
6 all you want to do is be able to look at those documents  
7 outside, and they're your documents.

8                   MS. DAITZ: Yes, Your Honor.

9                   THE COURT: And you don't really have an objection  
10 to that.

11                   MS. DIPPOLD: No, no, and as I understand it, the  
12 witnesses have been prepared in their offices anyway. So I  
13 don't understand what the issue is.

14                   THE COURT: All right. I don't know that this  
15 presents a particularly serious issue and I assume that if you  
16 -- I'll put it to you this way: If any party wants to prepare  
17 -- and I guess we're really only talking about the defendant -  
18 - if the defendant wants to prepare a 30(b)(6) witness and  
19 that requires the defendant to look at documents that the city  
20 has designated, or any of the defendant designated, as  
21 confidential, then they will be allowed to look at those  
22 documents consistent with whatever security the city wants to  
23 impose on it, including whether or not they may need to take  
24 the documents outside of where they reside.

25                   They're not technically speaking an expert but

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2 obviously, to the extent that somebody's a 30(b)(6), they  
3 really are a quasi expert in the sense that they're talking  
4 about policies and procedures, and are speaking  
5 authoritatively for the defendant.

6 So I don't know whether you want to have a specific  
7 exemption for 30(b)(6) but you can anticipate that as long as  
8 they are the defendants' documents that have been designated,  
9 I don't have any problem with it. Ms. Nelson?

10 MS. NELSON: Just one clarification, Your Honor. I  
11 think you said where the expert resides and when we're  
12 actually talking about outside of defendants' counsel's  
13 office. So I just wanted to clear that up for the record.

14 THE COURT: Right. And I'm assuming this only  
15 becomes an issue if you want them to look at it outside of --  
16 I guess is -- where are these documents now?

17 MS. NELSON: In our office at the law department.

18 THE COURT: All right. Outside the law department,  
19 but yes, that's what I meant.

20 MS. NELSON: Thank you, Your Honor.

21 THE COURT: If I misspoke. So I don't know if you  
22 want to have anything more specific than that. And since the  
23 plaintiff's concern, and I think either side's concern, is  
24 that the documents they've designated as confidential are to  
25 some extent give you more leeway on how you deal with your

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2 documents.

3                   But certainly a 30(b)(6) is a unique witness in that  
4 regard. So I don't know if you require them to see them  
5 outside of the law office, the law department, but if you --  
6 if it becomes necessary, I assume that you'll only do it in a  
7 circumstance in which you will be able to convince me without  
8 a doubt that it was necessary to do it.

9                   MS. NELSON: Yes, Your Honor.

10                  THE COURT: Anything else.

11                  MS. DAITZ: Not from defendants, Your Honor.

12                  MS. BYRIALSEN: I think we need an adjourn date.

13                  THE COURT: Yes, we do. Adjourn date before my law  
14 clerk leaves.15                  MS. BYRIALSEN: We had spoken about September 9th  
16 but since that's the day your law clerk, perhaps --17                  THE CLERK: I'll be here on September 9th but it'll  
18 be my last day.19                  THE COURT: You're a glutton. What day of the --  
20 that's a --

21                  THE CLERK: That's a Friday.

22                  THE COURT: Can we do it on the 8th.

23                  THE CLERK: We have a trial that week.

24                  THE COURT: We have a trial that week?

25                  THE CLERK: But hopefully (inaudible).

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2 MR. BELDOCK: We could do the 8th, Judge, as well.

3 THE COURT: If we're in trial we'll give the jurors  
4 a half hour off. I don't like to plan anything for the last  
5 day of somebody's work tenure. You never know what we might  
6 be doing on that last day.

7 THE CLERK: All right. Judge, September 8th at  
8 10:00 a.m.

9 THE COURT: That ought to be appropriate. You, Ms.  
10 Daitz, you'll be sending me clean copies. I don't doubt that  
11 we could find them but I'm sure you can put your hands on them  
12 quicker than we can.

13 MS. DAITZ: Yes.

14 THE COURT: And did you want to give me a copy of  
15 Judge Batts's --

16 MS. DIPPOLD: Yes, I can do that and I think, as a  
17 matter of fact, I think I have copies of both stipulations  
18 that have no writing on them at all.

19 MS. DAITZ: Okay. Can I just take a look at them?

20 MS. DIPPOLD: Sure.

21 MR. BELDOCK: We'll hand them up.

22 THE COURT: You're just getting along so well. Is  
23 it the warm weather?

24 MS. DAITZ: Thank you, Your Honor.

25 MR. BELDOCK: Thank you, Your Honor.

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THE COURT: Okay. Then we'll be adjourned.

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(Whereupon the matter is adjourned to

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September 8th, 2011 at 10:00 a.m.)

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## C E R T I F I C A T E

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4 I, Carole Ludwig, certify that the foregoing transcript  
5 of proceedings in the United States District Court,  
6 Southern District of New York, McRay, Richardson, et al.  
7 v., Docket #03cv9685 was prepared using mechanical  
8 transcription equipment and is a true and accurate record  
9 of the proceedings.

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Signature \_\_\_\_\_

CAROLE LUDWIG

Date: July 13, 2011